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ABSTRACT

Recognizing that writing is perhaps more crucial to law than to any profession, the Southwestern University School of Law began an interdisciplinary writing program in 1979. The legal communication skills course is a mandatory part of the first-year curriculum, continuing for two semesters and awarding three unit credits. The course strives to teach basic writing skills, the formal conventions of legal writing, research methodology, reasoning and analysis skills, and oral advocacy. Writing assignments ask students to explore the structure, purpose, and style of each type of legal form, and students learn to apply techniques of legal reasoning and analysis and the knowledge gained in their substantive courses to the writing of these legal documents. Principles of revision are taught using Richard Wydick's "Plain English for Lawyers." Basically, his revision techniques fall into the three broad categories of diction, syntax, and concision. After discussing his techniques, students are given three paragraphs from cases the students have already encountered in class that embody some of the greatest errors of style and asked to revise them. (HOD)

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ACHIEVING PLAIN ENGLISH: AN EXERCISE IN LEGAL STYLE

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ACHIEVING PLAIN ENGLISH: AN EXERCISE IN LEGAL STYLE

Perhaps because "legalistic writing" itself connotes unclear or jargonistic writing, the legal community has taken upon itself the job of establishing "Plain English for Lawyers," to quote the title of Richard Wydick's groundbreaking article.

In response to the law community's call for more clear and concise writing (a call echoed in, if not prompted by, several states' recently enacted Plain English laws) and the all-time low writing ability of students entering the nation's law schools, Southwestern University School of Law began one of the most ambitious interdisciplinary writing programs in the country in 1979. The school recognized the fact that writing is perhaps more crucial to law than to any other profession; the lawyer seeks to inform, clarify, and persuade, using language as his primary tool. Developing good written and oral skills is the basis for developing good lawyering skills.

Southwestern's program, as it currently exists, is a radical departure from traditional legal writing programs. Typically, first-year law teachers, lawyers themselves, present the course, concentrating mostly on the law and very little on writing. These "legal writing" courses often become courses which address little other than legal reasoning, failing to teach basic writing techniques, let alone more advanced rhetorical strategies. If a writing course concentrating on basic communications skills and taught by composition or communication experts is ever offered, it is as an elective course which law students are not required to take. However, in March of 1979, Dean Leigh Taylor appointed an ad hoc committee on Legal Research and Writing which formulated a proposal for an intensive interdisciplinary

program taught by professional writing instructors, none of whom had a law degree.

Today, Southwestern's legal writing program is in its sixth year, has generally been well received by students and faculty, and has attracted favorable attention throughout the legal community. The Legal Communication Skills course presently employs four English professors, each responsible for two classes of 40-50 students. The course is a mandatory part of the first-year curriculum, continuing for two semesters and awarding three unit credits.

The goal of the course, broadly stated, is to bridge the gap between entering law students' ability and the requirements of the profession. More specifically, the course strives to teach basic writing skills, the formal conventions of legal writing, research methodology, reasoning and analysis skills, and oral advocacy. The course is primarily tri-partite in structure to accomodate these goals; legal librarians teach the legal methodology component; traditional law teachers provide writing assignments, generally in one of the fields of law the first-year students are currently covering; the English faculty teach the reasoning and writing component.

The focus of the course is on formal legal writing conventions, including proper citation form, proper use of legal "terms of art" (as distinct from "legalese" or unnecessary legal jargon), and the conventional forms of legal drafting, including legal memoranda, briefs, and client letters. Written assignments ask students to explore the structure, purpose, and style of each type of legal form, and students learn to apply techniques of legal reasoning and analysis and the knowledge gained in their substantive courses to the writing of these legal documents.

However, the problem with legal writing, as with all interdisciplinary writing, is that it is content-oriented. Unlike traditional undergraduate

writing programs (even the more sophisticated composition courses tied to students' majors or to specific subject courses) whose subject matter is based on general knowledge or knowledge acquired in a given class, our "subject matter" is the practical application of that "seamless web" of complexity -- The Law.

Perhaps because of that complexity, but more probably creating it, legal writing style is characterized most often as "wordy, unclear, compous, and dull" (D. Mellinkoff, The Language of the Law, 1963). Thus, one of the greatest tasks in teaching legal writing is teaching clarity and concision in legal writing style. However, this is a concept of legal style that many entering law students find anathema. Having waited long to sound like a lawyer, they object to having a legal writing instructor tell them that they must reject the very style they associate with things legal. They have grown up with a notion of what legal style is and consider words like "aforementioned" and "hereinafter" their birthright.

Worse than this, students tend to see style as something subjective. Even teaching style, we sometimes get caught up in this perception to a certain degree. Grammar may be objective -- right or wrong, good or bad -- but style is amorphous, tenuous; it is not something objectively definable, and therefore, it is often difficult to teach. However, if we sever ourselves from this perception it becomes clear that we <u>can</u> teach style as an objective consideration which students can aim for and revise toward. Style is not something that simply emerges from an emotional response or from personal taste. It is something much more concrete, defined through precise and concise diction and syntax. In short, with a codified program of stylistic revision, we can teach students that plain English is "better" than pseudo-erudite gobbledygook. It is "right" just as it is right to make subjects and verbs agree, and gobbledygook is wrong

just as it is wrong to have a pronoun that does not agree with its antecedent. And, as a final point, if we can objectively teach style, we can also objectively distinguish, evaluate, and grade it in student papers.

The problem, of course, is to find a codified program of stylistic revision and appropriate methods of teaching it to students. Fortunately, six years ago Professor Richard Wydick provided legal writing teachers with a program of stylistic revision in his book, Plain English for Lawyers (Carolina Academic Press, Durham, North Carolina, 1979). In his introduction he characterizes the problems endemic to legal prose:

> We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences, twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers.

Using his evaluation of problems endemic to legal prose and his six chapters of revision techniques, I have developed several in-class exercises designed to teach students how to achieve plain English. After students have read Wydick's book, we discuss his principles of revision in class. I then provide students with three paragraphs from different judicial opinions and the following summary of Wydick's six chapters, reorganized into the three broad categories into which all his revision techniques logically fall:

I. Diction:
- use concrete diction
- use base verbs--avoid nominalizations
- avoid "legalese"
- avoid sexist language
- avoid elegant variation
- avoid noun chains
- avoid overuse of adjectives and adverbs

II.	Syntax:	use active voice
		use normal word order
		avoid misplaced modifiers
III.	Concision:	omit surplus words
		avoid compound prepositions
		avoid word clusters, "throat clearers"
		avoid redundant legal phrases
(toward the final goal of):		shorten[ing] phrases and clauses
		shorten[ing] sentences (average, 25 words)

The paragraphs are from cases that students have already encountered in class and invariably had difficulty reading. The first is a statement of the facts of the case, a piece of writing that nearly all legal forms call for and which students are constantly called upon to write themselves. The second is a statement of the court's holding in the case, the virtual heart of any opinion, and students know from their reading how important it is to be able to read an opinion which is understandable on first reading.

Students then revise these paragraphs, which embody some of the worst errors of style. I find that students respond well to revising a piece of writing which they have often found inpenetrable on first reading. They see that they can successfully rewrite even the worst prose in 10-15 minutes using a system of revision specifically geared to legal prose, and they are later more willing (and able) to revise their own writing using the same guidelines.

The exercises, appended at end with their revisions, fit nicely into a two-hour class. I begin with paragraph "A," a statement of the facts, and work through the first attempt at revision with the students, often using

an opaque projector, so students can see the revisions being made. The paragraph, while undoubtedly a conscious attempt at an overblown style, nonetheless provides an easy -- and amusing -- starting point. Nearly all the revisions are in diction, and students quickly pick up on methods of cutting excess verbage. I then pass out a sample revision.

I follow this easy revision with something much more difficult, paragraph "B," a statement of the court's opinion. The paragraph consists of only two sentences, so I number each main thought and begin systematically working through the revision with them. After I've revised paragraph "B" with the students and provided them with the sample revision, I have them revise paragraph "C" in class, if time permits, or as a homework assignment. After they have finished the revision process, I give them the final sample revision, and we compare and discuss their efforts and the problems they encountered. Although I don't expect students to have the grammatical labels, I do find that they can isolate the problems and make valid suggestions for remedying them.

Once students have found that they can successfully revise a very difficult passage in a relatively short time, I find them adapting these revision techniques to their own writing. Certainly these techniques do not put an end to all stylistic problems, but students show marked progress in clearly and concisely presenting their ideas.

THE EXERCISES

Paragraph A: Statement of Facts

[1]It appears that a man, whose identity it would be indelicate to divulge, was feloniously relieved of his portable goods by two nondescript highwaymen in an alley near 26th Street and Third Avenue, Manhattan; [2]they

induced him to relinquish his possessions by a strong argument ad hominem couched in the convincing cant of the criminal and pressed at the point of a most persuasive pistol. [3]Laden with their loot, but not thereby impeded, they took an abrupt departure, and [4]he, shuffling off the coil of that discretion which enmeshed him in the alley, quickly gave chase through 26th Street toward 2nd Avenue, [5]wither they were resorting "with expedition swift as thought" for most obvious reasons. [6]Somewhere on that thoroughfare of escape they indulged the strategem of separation ostensibly to disconcert their pursuer and allay the ardor of his pursuit. [7]He then centered on for capture the man with the pistol, whom he saw board the defendant's taxicab which quickly veered south toward 25th Street on 2nd Avenue, [8]where he saw the chauffeur jump out while the car was still in motion, continued toward 24th Street; [9]after the chauffeur relieved himself of the cumbersome burden of his fare the latter also is said to have similarly departed from the cab before it reached 24th Street.

From: Cordas v. Peerless Transportation Company, New York Court of Appeals, 1941

Revision A

[1]Two men robbed another man in an alley near 26th and 3rd in Manhattan. [2]They forced him to hand over his possessions, threatening him at gunpoint. [3]They left quickly with his possessions, and [4]he chased them down the alley [5]where they were trying to make their getaway. [6]The robbers separated in the alley to avoid both being caught. [7]The man then ran after the robber with the gun, whom he saw getting into Defendant's taxicab, which quickly turned south toward 25th on 2nd Avenue. [8]Here

the man saw the driver jump out of the moving taxi, which continued up 24th Street. [9]Then the robber also jumped out of the moving taxi before it reached 24th Street.

Paragraph B: Statement of the Holding

[1]We are of opinion, and so hold, that the complaint, [2]in so far as it alleges the making of false representations for the purpose of inducing plaintiffs to enter into the contract, knowing the same to be false, to the effect that the electric road would be completed and in operation by July 1, 1909, states a cause of action. [3]While it is true as a general rule that false representations, upon which fraud may be predicated must be of existing facts, and cannot consist of mere promises or conjectures as to future acts or events, [4]yet, (citation) if in making the representations defendant "intended to create in plaintiffs the belief that it was, as a fact, the then intention of the" traction company to complete the road at the time represented, and [5]"the representations might be understood and were understood by plaintiffs as asserting that fact," [6]then a charge of fraud may be based thereon, though the represented event was to occur in the future.

From: McElrath v. Electric Investment Co., Supreme Court of Minnesota, 1911

Revision B

[1]We hold that the complaint states a cause of action [2]because it alleges that the defendant knowingly made false representations to induce the plaintiff to contract that the electric road would be completed and in opera-

tion by July 1, 1909. [3]Generally, false representations leading to fraud must be made about existing facts and cannot consist of mere promises or conjectures about future events. [4]However, if the defendant (making the representations) intended to create the belief that it was then the intention of the traction company to complete the road at the time represented, and [5]if the plaintiff believed this, [6]then a charge of fraud may be brought, even though the event was to occur in the future.

Paragraph C: Statement of the Rule

[1]When the inquiry is upon an issue whether a certain alleged fact existed or happened in the past, it is not sufficient to prove only or no more than a possibility, however substantial the possibility may be, so long as it is only a possibility. [2]There the proof must establish the fact as a probability, using that word in its ordinary and common acceptation. [3]But when the inquiry is one of foreseeability, [4]is as regards a thing that may happen in the future and to which the law of negligence holds a party to anticipation as a measure of duty, [5]that inquiry is not whether the thing is to be foreseen or anticipated as one which will probably happen, according to the ordinary acceptation of that term, but whether it is likely to happen, even though the likelihood may not be sufficient to amount to a comparative probability. [6]The test as respects foreseeability is not the balance of probabilities, but the existence, in the situation in hand, of some real likelihood of some damage and the likelihood is of such appreciable weight and moment as to induce, or which reasonably should induce, action to avoid it on the part of a person of reasonably prudent mind.

From: Gulf Refining Co. v. Williams, Supreme Court of Mississippi, 1938

Revision C

[1]When the question is whether something happened in the past, it is never sufficient to prove a mere possibility, no matter how substantial that possibility. [2]One must prove probability, using the word in its ordinary sense. [3]But when the question is whether something is foreseeable, [4]which one must anticipate as a measure of duty under the law of negligence, [5]one need not prove that the thing will probably happen, but only that it is likely to happen. [6]The test for foreseeability is not whether there is a balance of probabilities, but whether there is sufficient likelihood of some damage to induce a reasonably prudent person to avoid it.